South Atlantic Trucking, Inc. *and* International Longshoremen's Association, Local No. 2062, AFL–CIO. Case 12–CA–19437

January 29, 1999

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

Upon a charge filed by International Longshoremen's Association, Local No. 2062, AFL–CIO, the Union, on April 20, 1998, the Acting General Counsel of the National Labor Relations Board issued a complaint on June 30, 1998, against South Atlantic Trucking, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.[1]

On September 14, 1998, the Acting General Counsel filed a Motion for Default Summary Judgment with the Board. On September 15, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. Pursuant to the Respondent's request, the time for filing a showing of cause in response to the Acting General Counsel's Motion for Default Summary Judgment was extended until October 13, 1998.

On October 13, 1998, the Respondent filed a document entitled Verified Response and Opposition to Motion for Default Summary Judgment and Showing of Good Cause.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. Section 102.114(g) of the Board's Rules and Regulations specifically provides that facsimile transmissions of answers to complaints will not be accepted for filing. Section 102.111(b) states that documents postmarked on or after the due date are untimely. In addition, the complaint affirmatively states that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted.

The undisputed allegations in the Motion for Default Summary Judgment disclose that, by letter of August 10, 1998, the Acting General Counsel notified the Respondent's attorney that an answer to the complaint had not been received and that unless an answer were filed by August 17, 1998, a motion for summary judgment would be filed. On August 18, 1998, the Respondent submitted an answer by facsimile transmission. Not until August 31, 1998, did the Respondent file its answer with the Regional Office in Tampa, Florida, by express and regular mail.

In the response to the Notice to Show Cause, the Respondent's counsel contends that he attempted to fax the answer to the Regional Office during the late afternoon on August 17, 1998, but was unable to complete the fax until August 18, 1998, because the Region's fax machine was apparently turned off after 5 p.m. In addition, the Respondent's counsel states that the hard copies of the answer were misplaced in his office, and were not found and mailed until approximately a week later. Finally, the Respondent's counsel argues that entry of summary judgment would be unfair because the Respondent has not failed to bargain in good faith with the Union.

We find that the Respondent's answer was not timely filed. First, as discussed above, Section 102.114(g) of the Board's Rules and Regulations provides that the filing of answers to complaints by facsimile is not allowed. *E. R. Industries*, 320 NLRB 935 (1996). Second, even if filing of answers by facsimile were acceptable under the Board's Rules, the Respondent's facsimile transmission was not received until August 18, 1998, 1 day after the due date. Although the Respondent contends that it unsuccessfully attempted to fax its answer on August 17, 1998, Section 102.114(f) of the Board's Rules and Regulations specifically states that "[a] failure to timely file or serve a document will not be excused on the basis of a claim that transmission could not be accomplished because the receiving machine was offline or busy or unavailable for any other reason." Thus, the Respondent's late fax transmission would not have been excused, even if facsimile filing of answers were allowed under the Board's rules. Third, the copies of the answer which were mailed were also untimely. One was sent by express mail and was not received until August 31.[2] The other, sent by regular U.S. mail, was postmarked August 29, 1998, and was not received until August 31, 1998. To be timely under the Board's Rules, the answer would have had to have been postmarked on or before August 16, 1998, or received on or before August 17, 1998. See Section 102.111(b) of the Board's Rules and Regulations.

We also find that the Respondent has failed to establish good cause for the failure to file a timely answer. The Respondent's bare explanation that the copies were misplaced and not mailed for a week does not establish good cause for failing to file a timely answer. *Father &*

[1] A copy of the complaint was also sent to the Respondent's counsel on June 30, 1998, but a mistake was made in his address. The complaint was then remailed to him by regular mail on July 13, 1998.

[2] It is not possible to read the postmark on the copy of the express mail envelope attached to the Acting General Counsel's motion. However, the Respondent does not argue that the answer sent by express mail was tendered to the United States Postal Service on or before August 16, 1998. See the discussion of the Board's postmark rule, infra.

Sons Lumber, 297 NLRB 437 (1989), enfd. 931 F.2d 1093 (6th Cir. 1991).

The Respondent further argues that its failure to file a timely answer should be excused because its attorney is not a regular practitioner with the National Labor Relations Board and is not familiar with all of the Board's rules of procedure. We find no merit in this argument. The Respondent received clear notice of its obligation to file a timely answer and its attorney's unfamiliarity with the Board's procedures does not constitute good cause for late filing. *Duro Pleating*, 317 NLRB 614 (1995).[3] Similarly, we find no merit in the Respondent's argument that the Acting General Counsel has not been prejudiced by the Respondent's failing to file a timely answer. It is not necessary to show prejudice to the Acting General Counsel to require the Respondent to comply with the Board's Rules.

In sum, the Respondent's response to the Board's Notice to Show Cause is inadequate because it does not sufficiently explain the Respondent's failure to file a proper and timely answer or provide a cogent reason for further extending the answering period. The Respondent's attack on the factual allegations of the complaint, which would have been appropriate in a timely answer, simply came too late when, as here, it was included for the first time in the response to the Notice to Show Cause. *Daywork Fire Protection*, 299 NLRB 328 (1990). Accordingly, we find that the Respondent has failed to establish good cause for the failure to file a timely answer.

In the absence of good cause being shown for the Respondent's failure to file a timely answer, we grant the Acting General Counsel's Motion for Default Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Florida corporation with an office and place of business in Miami, Florida, has been engaged in the business of freight transportation within the State of Florida. During the 12-month period ending March 31, 1997, the Respondent, in the course and conduct of its business operations within the State of Florida, derived gross revenues in excess of $50,000 for the transportation of freight in interstate commerce pursuant to arrangements with and as agent for various common carriers, including Stroh's Beer, FAI Trading, and JB Fuller, each of which operates between and among various States of the United States. By virtue of these operations, the Respondent functions as an essential link in the transportation of freight in interstate commerce. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

The Union was certified on July 16, 1997, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time dispatchers and truck drivers employed by the Respondent working out of the Respondent's facility located at 10887 N.W. 17th Street, Miami, Florida.

At all times since July 16, 1997, the Union has been the exclusive representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

By letters dated February 12, March 5 and 17, and April 3, 1998, as well as in telephone conversations, the Union requested to meet and bargain with the Respondent. Since about February 12, 1998, the Respondent has failed and refused to meet and bargain with the Union. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By the acts and conduct described above, since February 12, 1998, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(a)(5) and (1) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Correctional Medical Services*, 325 NLRB 1061 (1998); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir.

[3] "The Office of the Executive Secretary and the Regional Offices are always available for consultation in the event counsel is unsure of due dates under current rules. If the Board were to excuse a failure to ascertain the requirements of applicable rules, then the rules would become a nullity." *Bartlett Nuclear*, 314 NLRB 1 fn. 1 (1994), enfd. 81 F.3d 169 (9th Cir. 1996).

1964), cert. denied 379 U.S. 817 (1964); *Mar-Jac Poultry Co.,* 136 NLRB 785 (1962).[4]

ORDER

The National Labor Relations Board orders that the Respondent, South Atlantic Trucking, Inc., Miami, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Longshoremen's Association, Local No. 2062, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time dispatchers and truck drivers employed by the Respondent working out of the Respondent's facility located at 10887 N.W. 17th Street, Miami, Florida.

(b) Within 14 days after service by the Region, post at its facility in Miami, Florida, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 12, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Longshoremen's Association, Local No. 2062, AFL–CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following appropriate bargaining unit:

> All full-time and regular part-time dispatchers and truck drivers employed by us working out of our facility located at 10887 N.W. 17th Street, Miami, Florida.

SOUTH ATLANTIC TRUCKING, INC.

[4] Contrary to his colleagues, in the absence of any allegation of overall bad-faith bargaining, and with the first unfair labor practice by the Respondent occurring 7 months into the certification year, Member Brame would extend the certification year by 5 months, running from the date the Respondent begins to bargain in good faith. See, e.g., his position in *Day & Zimmerman Inc*., 325 NLRB 1046, 1049 fn. 15 (1998).

Member Hurtgen finds it unnecessary to pass on Member Brame's point. He notes that the unanswered complaint explicitly sought a *Mar-Jac* remedy as does the Motion for Summary Judgment. The application of the standard *Mar-Jac* remedy is uncontested here.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."